

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2023

United States Court of Appeals
For The Second Circuit

Docket No. 77-2023

UNITED STATES OF AMERICA, ex rel.
VICTOR MAYO,

Petitioner-Appellant

-against-

RAY BOMBARD, Superintendent of Greenhaven
Correctional Facility at Stormville, New York,

Respondent-Appellee

On Appeal From The United States District Court
For The Southern District of New York

PETITIONER'S PEPLY BRIEF

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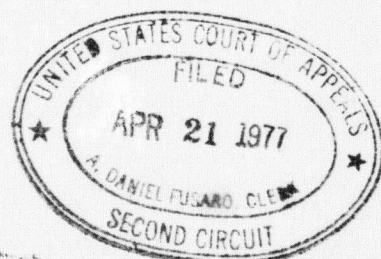


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PETITIONER'S REPLY BRIEF

Preliminary Statement

Petitioner submits this Brief in reply to the Brief for Respondent-Appellee. That brief will hereinafter be referred to as the "State's Brief;" Petitioner's original brief will be referred to as "Mayo's Main Brief." The State's arguments require only brief comment.

ARGUMENT

I. THE STATE HAS NO ANSWER
TO PETITIONER'S INEFFECTIVE
ASSISTANCE OF COUNSEL ARGUMENT.

The State makes two inconsistent arguments with respect to Petitioner's ineffective assistance of counsel argument. The first (set forth at pages 26 to 28 of the State's Brief) seeks to excuse counsel's failure to inquire into mental condition on the ground that counsel was not "aware" of that condition; the second (set forth at pages 28 to 32) seeks to treat this case as if full investigations had been made and this appeal simply involved counsel's choice of trial strategy.

In fact what this appeal involves is the absence of any trial strategy attributable to only one thing: inexperienced counsel's failure to investigate. Counsel failed to ask rudimentary questions about his client's background before trial and even failed to explore the mental health question after his client's lengthy commitment in a mental hospital was disclosed to him at the time of sentencing. These failures to investigate are what cannot be excused. They are the omissions that fall short of the minimal defense standards established by the American Bar Association and have been held to constitute ineffective assistance of counsel even

under the "farce and mockery of justice" standard which the State argues this Court should retain.* (See Mayo's Main Brief at 34-41).

Had background inquiries been made by counsel and had Mayo's mental health been pursued, Mayo might have been found incompetent to be tried. In addition, counsel could at least have explored the possibility of raising an insanity defense or of challenging the voluntariness of the confession made by Mayo -- then a retarded seventeen year old boy described by a psychiatrist as an "adynamic sphinx" (A. 293) -- at four o'clock in the morning after an evening of drinking and six and a half hours at police headquarters.

The State speculates that it might have been a "rational act" not to pursue some or all of these matters. (State's Brief at 29.) The record is clear, however, that possible defenses were abandoned as a consequence of ignorance, not of deliberation. Defenses were "withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all." Brubaker v. Dickson, 310 F.2d

* But see Rickenbacker v. Warden, Docket No. 76-2036, slip opinion at 1070-71 (2d Cir. December 22, 1976).

• 30, 39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963).

Counsel here admits that he would have explored issues such as competency, insanity and the voluntariness of Mayo's confession had he had more information but that he "had not sufficient experience" to broach the question of mental health or to handle such issues in 1960. (A. 121, 127; Mayo's Main Brief at 14.) What more need be shown to establish ineffective assistance of counsel?

II. THE STATE HAS NO ANSWER
TO PETITIONER'S
PATE v. ROBINSON ARGUMENT.

The State argues that the due process violation which occurred when the State court failed to inquire into Mayo's competency sua sponte after reading the presentencing report has been "cured" either by a subsequent coram nobis proceeding held seven years after the fact or by Judge Lasker's hearing held twelve years after the fact. (State's Brief at 34-38.)

The State made the same argument before Judge Cannella who rejected it because "it would impose an impermissible burden on the petitioner to make his freedom hinge on a nunc pro tunc determination of his competency." (A. 317.) Similar arguments were rejected by the Supreme Court for essentially the same reasons in Pate v. Robinson, 383 U.S. 375, 387 (1966) and Drope v. Missouri, 420 U.S. 162 (1975).

Pate and Drope make it clear that if a nunc pro tunc hearing can ever compensate for the required hearing contemporaneous with trial, it is only in the unusual case where sufficient contemporaneous evidence relating to competency is adduced by the State so that petitioner's competency or incompetency can fairly and reliably be established. See Mayo's Main Brief at 23 & authorities cited. The State court coram nobis proceeding came nowhere near this standard. The transcript

of that hearing is less than ten pages long. (A. 305-14.) No determination of any kind was made or even attempted with respect to Mayo's competence. Relief was simply denied because neither side had offered any medical or psychiatric proof. (A. 302-03.)

The hearing before Judge Lasker, though far more thorough than the State coram nobis proceeding held five years before, was equally inconclusive as a determination of Mayo's competency in 1960. Judge Lasker never found that Mayo was competent to stand trial in 1960. Rather, he found that Mayo was suffering from schizophrenia at the time of his trial (A. 250); that there were real doubts of Mayo's competence at that time (A. 256-58); that the lapse of twelve years made it almost impossible to tell what Mayo's mental condition had been in 1960 (A. 259); and that the court could not say "whether an inquiry in 1960 would have resulted differently." (Id.)

This inability to tell whether a competency hearing contemporaneous with trial "would have resulted differently" from a hearing held years later was the very reason that caused the Supreme Court to reject nunc pro tunc hearings in Pate v. Robinson and Drope v. Missouri. Neither Judge Lasker's hearing nor the coram nobis hearing has made up for the hearing that should have been held in 1960. The State has never established, as even the most grudging reading of Pate and Drope requires, that petitioner was competent to be tried in 1960.

Conclusion

A petition for habeas corpus cannot be denied merely because "there is a public interest in the finality of convictions." (State's Brief : 38-39.) The questions about the fairness of petitioner's trial and sentencing and the effectiveness of his counsel are substantial. The determination of his competency to stand trial that should have been made fifteen years ago has never been made and probably cannot be made for the reasons stated by Judge Lasker in 1972 and emphasized by the Supreme Court in both Pate and Drope.

The decision below should be reversed. The petition should be granted. Petitioner should either be retried forthwith or his conviction for the first crime should be vacated and he should be resentenced for the second crime.

Dated: New York, New York
April 21, 1977

Respectfully submitted,

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